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CONSTITUTIONALITY OF THE FEDERAL WHITE SLAVE ACT UPHELD.

The reach of the Interstate Commerce Clause to the purpose underlying passenger traffic between states seems to us an extension far beyond any of the cases heretofore decided. But Justice McKenna, speaking for an unanimous court, holds that by analogy decision concerning "articles of merchandise" contains the simple principle sufficient for the white slave legislation, which means, as we gather, that though women may not be "articles of merchandise," they may be, in the sense of the commerce clause, articles of trade. Hoke v. U. S., 33 Sup. Ct. 281; Athanasaw v. U. S., id. 285; Bennett v. U. S., id. 288; Harris v. U. S. id. 289.

Convictions in all of these cases were affirmed, the reasons for constitutionality of the White Slave Act being given in the first. Taken together these cases show that the Act will be enforced with unvarying breadth and rigidity without regard in the least to the manner of its operation in different states. It is in this especially shown, that immorality of persons is a feature in regulatory legislation just as may be impurity or unwholesomeness in articles of merchandise, and this in a purely independent way. This, we think, the opinion of the learned Justice to the contrary notwithstanding, is another step in national power.

The general distinction between the White Slave Act and legislation regarding articles of merchandise is quite apparent. You cannot constitutionally forbid interstate transportation to an immoral person, no matter that his immorality may have been judicially established. You may exclude therefrom impure or unwholesome freight. Legislation as to the latter has nothing to do with the purpose of the transportation. In freight the character of shipments is the test; as to passengers the character of everyone is the same.

The necessary result of validity in the White Slave Act is that, over and beyond keeping the stream of commerce unpolluted, is the right to enforce or, at least, make an impress upon, internal policies of states. Of course, this might result from regulation of the character spoken of in regard to freight, but this must be seen to be incidental and not direct. But the White Slave Act has its operation primarily on policy and incidentally on transportation, exactly the reverse of matters in regulations for carriage of freight.

What lies in the womb of these White Slave Act cases so far as the extension of federal power over states is concerned? Congress, in this law, has a conception of right conduct between individuals through and by its regulation of intercourse between states. Its point of jurisdiction is upon a line between two states. It exists, therefore, in a physical fact jumping across a state and reappearing on the border of its neighbor. But jurisdiction as to a moral quality is pervasive of territory.

In this legislation the Congressional concept is in accord, it so happens, with the moral view everywhere. But the court says, in effect, it makes no difference whether it is or not. Congress, therefore, can assert whatever of moral view it sees fit and give it vigor in commerce legislation. But why is it confined to moral views and not reach out and promote everything it wishes under a general welfare policy?

Take, for example, liquor, which is an article of commerce, and suppose that Congress should conceive that it ought not to be shipped to territory east or west of a certain longitude or north or south of a certain latitude, because in the defined territory it is more productive of poverty or lawlessness than elsewhere. Or, take grain and let the Congressional idea be that it was not to be kept out of market except for a specified time or sold above a certain advance upon original cost. What need then

would we have of the Sherman Act or various state anti-trust acts? Certainly there is valid ground in general welfare for such an act, if Congress may take into consideration the purpose in the use of transportation.

Generally a combination or conspiracy is the gist of offense in interstate commerce. In the White Slave Act, the woman, an article of commerce, may be as pure in intent as the icicle on Dian's temple, and purpose be in only one foul breast.

If we reduce a woman, when an interstate passenger, to an article of merchandise and then punish one who pays for her transportation because he has an ultimate intent as to her employment in immorality, why may not penalty be affixed to transporting anything across a state line, where there is a purpose which Congress thinks is contrary to the public welfare of the country as a whole, whether it be so deemed by a particular state or not?

These White Slave cases are the first we know of which assert that Congress may take a hand in the personal conduct of individuals, because that is contrary to the standard of right living. If this is right, we confess we are unable to scan its further shore so far as state control of its domestic affairs are concerned.

One must feel gratified that the White Slave Act can be enforced, but regret that it is necessary to declare therefor a principle, which in its potency may be destructive of so much that ought to remain beyond Congressional power. It is not in the realm of higher conception, that we are left to rest our control over moral conduct upon a mere power to regulate trade. It also may be said, that these cases foreshadow very definitely constitutionality of the Webb Liquor Act.

NOTES OF IMPORTANT DECISIONS

STIPULATION—EXTENT IN CONTROLLING DISPOSITION OF CASE ON QUESTIONS OF FACT.—The case of Conwell v. Varain, 130 Pac. 23, decided by California District Court of Appeal, presents a very novel stipulation for the determination of a controversy upon the single view of one among many questions of fact.

The question was whether a power of attorney had been altered since delivery to include the property in controversy or if it originally embraced it along with other property. The evidence was in square conflict on this question. Thereupon counsel agreed that if it appeared that the loop of the letter "z" was under a certain line this should be conclusive evidence that the power of attorney remained unaltered and judgment should be entered for plaintiff. To ascertain this fact the court was authorized to submit the paper to an expert and if it appeared by his opinion that the loop was as stated this would be "conclusive proof" of the fact. After the court decided the case in accordance with this "conclusive proof," it awarded a new trial. The District Court of Appeal affirms the order for new trial because "no such stipulation * * * should be tolerated in any case, much less one involving valuable property rights, or as here, a large sum of money."

After this injudicial qualification, if there really was a question of principle at stake, the court goes on to say that: "A trial thus conducted is in effect more in the nature of an arbitration than a trial, but even less satisfactory than the former method of settling disputed questions of fact. * * * To place a litigant's rights in a trial thereof at the mercy, so to speak, of the ex parte opinion of any person, however well qualified such person may be to speak on the subject to which his opinion relates, is not to give such litigant's rights a fair and impartial trial according to the recognized and prescribed forms by which only issues of facts are authorized to be tried."

Why was not this case thus tried? Had the parties withdrawn all of the oral evidence in the case and consented that the expert's opinion should be introduced in evidence as competent evidence, would not a judgment in accordance therewith be founded on evidence? If it would, then why might it not be competent to agree in advance that no other evidence be considered? There might be some question about the sufficiency of such evidence to support a judgment, but that view was not discussed at all. An attorney has the unlimited right to withdraw evidence with the consent of the other party and that is all, in effect, that was done in this case, and we fail to see how the court's judicial functions were controlled, if as a matter of law the expert's findings were sufficient to support the judgment. The words "conclusive proof" in the stipulation were of

little effect, if the finding was agreed to constitute competent proof.

INSURANCE—DELAY IN PASSING ON APPLICATION CREATING LIABILITY OF INSURER.—It seems quite a drastic thing to say that, if one solicits insurance and there is a reasonable certainty that the applicant finally will be accepted, he may be considered to be insured, if he dies before he is accepted, because formal acceptance has been unreasonably delayed. And yet this is what was held in Duffie v. Bankers' Life Assn. of Des Moines, 139 N. W. 1087, decided by Iowa Supreme Court.

This case shows that an applicant agreed that the insurance should not begin until the policy issued, and the advance receipt for fees recited on the back thereof that agents should not promise to deliver the policy or certificate in less than a reasonable time and if delay is unusual the applicant should write for cause. In this case the applicant died from drowning twenty-seven days after the application was received along with report by the company's medical examiner recommending acceptance, deceased being informed of such favorable report. The delay in action upon the application was not explained and no inquiry was made by decedent in the matter. The Supreme Court affirmed a judgment in favor of beneficiary.

The opinion says the action proceeded on the theory that defendant having solicited and received the application for insurance it owed to applicant "the affirmative duty either of rejecting or accepting it within a reasonable time and upon breach of such duty it is liable for all damages suffered in consequence of such breach." It was said: "The action is not based on contract ,either express or implied, but solely on tort."

The court after finding the evidence sufficient to justify submission to the jury of unreasonable delay, as to which decedent was not at fault and that otherwise the policy would have issued, answers the objection of no liability otherwise than upon a policy by saying: "This view overlooks the fact that the defendant holds and is acting under a franchise from the state." Then the opinion speaks of this franchise right requiring it to act promptly or incur risk.

This seems to be a very narrow ledge for liability to rest upon. The exercise of that franchise was it seems to us, for specific legislative detail, rather than for courts to raise liability by construction.

It must be conceded, however, that the ruling has authority back of it as, see, N. W. L. Ins. Co. v. Neafus, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211; Boyer v. State Farmers' Mutual Hail Ins. Assn., 86 Kan. 442, 121 Pac. 329, 40 L. R. A. (N. S.) 164. But there is stressed the idea therein of insurance applications being solicited instead of insurance being sought, a rather shadowy distinction as appears to us. A proposal for insurance is a proposal whether an agent's persuasiveness secures it or not. These refinements are not entitled to great recognition.

A PLEA AGAINST JURISDICTION FOR DIVERSITY OF CITIZENSHIP.

This article proposes to show that jurisdiction for diversity of citizenship has served its purpose as a ground of federal jurisdiction. If anything of that purpose remains, the large jurisdictional amount for calling it into exercise makes it approach the vanishing point in actions *ex contractu*. As to torts this amount and the Federal Employers' Liability Act have a similar tendency. While this Act applies only to carriers, it hardly will be supposed they should be distinguished, as non-residents. The question of abolishing this jurisdiction, moreover, appears to have close relation to reform of judicial procedure, in which our nation and states are now actively interested.

In the early days of the Republic it was stated by Chief Justice Marshall and Justice Story, that the Constitution gave to Congress, merely from apprehension of evil, the right to authorize inferior Federal Courts to try suits between citizens of different states. The Chief Justice said: "The Constitution itself either entertains apprehensions on this subject or views with such indulgence the possible fears and apprehensions of suitors that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.[1] This was said in 1809, by one who

was a contemporary of the Constitution's adoption. Seven years later Justice Story, a much younger man, in treating of such suits, spoke of the Constitution presuming that "State attachments, State prejudices, State jealousies and State interests might sometimes obstruct or control the regular administration of justice. No other reason than (this) can be assigned why some at least (of the cases mentioned) should not have been left to the cognizance of the State Courts."[2] The Justice shows elsewhere in the opinion in this case that he meant *exclusive* cognizance of State Courts.

It is not at all strange, that these apprehensions were felt by the framers of the Constitution. The clashing interests and jealousies of the colonies had nearly wrecked the revolutionary cause and the Constitutional convention came very near to disbanding. History accords to Benjamin Franklin's wise conciliation the avoiding of the latter disaster. As it was, however, conflicting interests, fears and jealousies wrote their compromises into our fundamental law. Diversities in climate, soil, production, habits, sympathies, to say nothing of the jealousies of which I have spoken, made almost as many different people as there were states. How were these states really to become a nation in the Constitutional sense? This was the problem. As one factor, it was thought there should be guarantee of equal rights to non-residents against residents in local courts. If this guarantee now may possess a shadow of claim for its embodiment into law, how greatly more may it be thought it should have been provided for at the birth of our nation?

But ere long the forests began to fall before the axe of progress. The school house, the public press and facilities for intercourse multiplied; enterprise and commercial adventure pushed on; the advantages, soils and products of every section became the servitors of our people as a whole. The diffusion of general education, and the intimate acquaintance of the east and the west, the north and the south, abolished provincialism. War had its part in this. Now, local prejudice and jealousy, state attachments and interests are anachronisms, so far as they may be thought to obstruct or control the administration of justice between individuals.

Probably the best proof of this lies in the fact that corporations so freely apply for permission to carry on business in other states than where they are organized. It is no answer to say that they rely on jurisdiction by national courts. There has always been a jurisdictional amount, which is now $3,000, and the great majority of transactions involve greatly less than this sum.

So far the view has been taken, that the purpose was to avoid extraneous considerations interfering with the due administration of law. Also, it has been assumed, that one law in a state between all suitors was intended to be applied by state and national courts. But this assumption is not entirely in accordance with the fact. It was, I believe, thus, until Justice Story, twenty-six years after he spoke as he did in Martin v. Hunter, *supra*, announced that the Federal Court had the right to disregard state ruling upon general principles of commercial law.[3] This decision let down the bars and the assertion of independence by the Federal Supreme Court has grown by what it fed upon. Several times members of the bench have assailed it as being an unconstitutional invasion of state rights, notably Justice Miller in Gelpcke v. DuBuque,[4] and Justice Field in Baugh v. B. & O. R. R. Co.[5]

Now about the only limitation of this independence is the yielding by Federal Courts to state interpretation of its written law. Of a state's common law the Federal Court asserts independence in con-

(1) Bank v. Deveaux, 5 Cranch 61.
(2) Martin v. Hunter, 1 Wheat. 304.
(3) Swift v. Tyson, 16 Pet. 1.
(4) 1 Wall. 175.
(5) 149 U. S. 368.

struction. Justice Miller said in Gelpcke v. DuBuque that the body of a state's common law is more extensive than its statutory law, so far as rights and obligations, in a civil way, are concerned. If this be true, then the state, though having the right to repeal all of its common law, retains it subject to interpretation by courts it can neither abolish nor control. Therefore, if a state desires uniformity in interpretation of its common law, it must direct its own courts to yield their view of what it is to the Federal view. Ought the states to abdicate? Certainly not, if John Marshall's and Justice Story's view of the reason for this Federal jurisdiction is the true reason. If Federal independence is also proper, then law is not law, but a court is law. If one court that is law conflicts with another court that is also law, both acting in the same sphere, then there is not merely confusion, but inequality in lawful right.

Considering the limitation as to amount in getting into the Federal court, the same party may have diverse and conflicting rights. In other words, there is Federal justice in big business, and, according to its view, state injustice in smaller. Contrariety shows itself in another way. If a citizen has a claim against a non-resident or a foreign corporation, and it is inconvenient to go or be called into a Federal Court, or he prefers to have applied the state view of his right, he cannot elect, unless he sues for less than $3,000. This is common practice in suits against foreign corporations. If the Federal view of independence is correct, it is impossible to think its courts should not as freely be open to one class of suitors as to another. This is not like varying jurisdictional amounts for lower and higher state courts, for they are all governed by one law.

Conceding, that wise compromise provided, in the beginning, for federal courts entertaining suits, as to which the ordinary jurisdiction is in state courts, is it to be admitted that our stability as a nation, our intercourse between states, our advance in general education and our more enlightened jurisprudence yet need this expedient of our early days? Had not such a provision been regarded as purely temporary, it would seem that our forefathers were trying to upbuild a republic which might never be secure.

If it be said that abundant resort to federal courts shows that there is practical refutation of the claim for this anomalous jurisdiction being abandoned, then inquiry is proper into the reason of this resort. It may be that it is because of fear of adverse partiality, or because Federal independence will refuse to recognize the rule of decision the state court will apply, or because the federal court is more convenient for him who prefers it, or more inconvenient for the other party. Whatever the reason, is it not an injustice, if a fair trial can be had in the state court?

On its face the federal statute is inconsistent legislation, unless it presumes, that all transactions involving less than $3,000 neither need the impartiality of federal courts nor their independent interpretation of state law. If it does this, it incorporates into law a presumption which must forever be unique. When we know, as we do, that probably ninety per cent of the business between citizens of different states is barred from access to federal courts, is it not time to inquire whether the other ten per cent really needs this privilege?

The matter, therefore, comes down to this: The federal statute enables non-residents, and this includes foreign corporations, to remove causes from state to federal courts on the ground of local prejudice, and for no other reason. At least some, and probably many, states believe there is no local prejudice its own statutes do not sufficiently displace. Presumably, it would care nothing about a cause being removed to a federal court, if state law, according to state interpretation, were there enforced. On the other hand, if the federal court is sought, not because of local prejudice, but to obtain a different inter-

pretation or to harrass adversaries, then, its jurisdiction is obtained through fraud and perjury. Why, therefore, should this resort continue to be allowed, especially, if the federal court persists in its right to independent interpretation of state law? What avails it, that it may have opportunity, once in a while, to declare and enforce its divergent view of state law, if it has no power to impress it outside of the cases it decides? Its decisions become merely incongruous elements, which rather derogate from, than enhance, the dignity of federal courts. At the same time, they reflect unbecomingly on state courts.

In the statement above that ninety per cent of interstate business is barred from federal courts, because of the increased minimum involved, I do not take into account actions in tort. But even without the Federal Employers' Liability Act it might be said that a very large per cent of this is naturally excluded and the effort to avoid federal jurisdiction would increase that proportion. This Act tends to make the jurisdiction quite as unimportant as in commercial transactions. The express prohibition in amendment to the Act against removal from a state court of any suit brought under the Act seems an admission of the very strongest character. It asserts, in effect, impartiality in state courts, so far as foreign corporations are concerned—at least where an employee sues a carrier. But, if in such a case, why not in every case? And, if in every case, then the conclusion is inevitable, that non-residents do not seek refuge in federal courts, because of prejudice or partiality, but for something else. What else is constitutional? Is it not a singular thing that both state and federal law should be practically asserting that local prejudice and partiality are non-existent and that jurisdiction in diversity of citizenship, for fear of these, should continue? That States assert impartiality is but a claim of self-respect. Many of them have statutes to prevent foreign corporations resorting to federal courts.

A final reason for abandoning this jurisdiction lies in the fact that time has changed matters around to the very reverse of what they were when the Constitution was adopted. Then, it was feared that undue advantage might be accorded to a resident over a non-resident or an alien. Now, with the federal court refusing to enforce state construction of state law, there is better ground for thinking that the non-resident and the alien possess undue advantage over the resident. If they sue or are sued, they select the court, whose rule of law suits them best. It is scarcely supposable there may be local prejudice against the resident when it is so greatly doubted, that it exists against the non-resident or the alien, in such a way that change of venue may not avoid it.

To me it seems peculiarly unfortunate that there should exist two independent interpreters of one law of force in one place. Nothing in the evil of conflicting decisions between states is comparable to conflicting law in the same state. For each state to control its own rule of law is government as was intended. For a state not to be permitted to do this is impossible logically to conceive.

At this time the Congress is working out, or seems on the eve of working out, great problems, whose solution will affect the commercial and industrial welfare of the people of every state. It has a free hand, an absolute right, through the federal courts, to enforce its legislation. Each state is looking to federal legislation in shaping its own destiny. It has its own commercial and industrial problems, and close relation of state with states makes their domestic concerns take on national importance. Therefore, just as the nation has and must have a conclusive interpreter of its law, it is both of state and national anxiety that state law shall have its one and only interpreter.

When this arrives, the movement to which the Federal Supreme Court and Congress have begun to respond for the simplifying of judicial procedure, will take on

additional force in the states. Jealousy between national and state courts will die. If nation, however, is to clash with state as to what are the rights of subjects among themselves, there may be peace, but the peace will be like that of the lion and the lamb—the state submitting to something about which the nation has merely an incidental interest. For the state it is a right that pertains to its domestic affairs and denial concerns its sovereignty.

NEEDHAM C. COLLIER.

St. Louis, Mo.

MASTER AND SERVANT—SIGNALS.

BURKE v. ASH et al.

Supreme Court of Minnesota, Jan. 31, 1913.

139 N. W. 705.

A servant whose duty consists in giving signals is not thereby charged with the performance of the master's absolute duties, unless the employment be in character necessarily dangerous to the workmen, or likely to expose them to injury unless timely warned by proper signals, or the employee is at work in a place safe in itself, which by some independent work done for the master's purposes becomes dangerous, unless prior warning of the danger be given.

BROWN, C. J.: Action for personal injuries, in which plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment or a new trial.

Plaintiff was in the employ of defendant, and, with others similarly employed, engaged in removing sand and gravel from a pit on premises adjacent to the Central High School, then under construction, in the city of St. Paul. The pit was a large open pit, some 80 feet wide and 15 feet deep—"kind of a round pit" as expressed by plaintiff on the trial. The sand and gravel were removed by means of a derrick operated by an engine some distance away. The engine was in charge of an employee whose operation thereof was guided and controlled by signals from another employee, who stood upon the bank near the pit and in view of the engineer. A "scale," so called, described in the evidence as a large, square box, would be lowered into the pit, filled with sand by plaintiff and his fellow workmen, and when the chains attached to the derrick boom were properly adjusted the employee upon the bank would give the necessary signal to the engineer, who in turn would set the engine in motion, raising the loaded scale, swing it into proper position and place, when it would be unloaded and returned to the pit. On the occasion here complained of a scale had been loaded with sand by plaintiff and his fellow workmen, the boom chains attached thereto and made ready to be raised when, and without notice or warning to plaintiff, who was between the scale and the bank of the pit, the employee on the bank gave the usual signal to the engineer to raise the load, who in response thereto set the machinery in motion, with the result that, when raised from the ground, the scale swung toward plaintiff, who had not been given an opportunity to get a safe distance away, and injured his leg.

Plaintiff thereafter brought this action to recover for the injury received, charging that it was occasioned by the negligence of defendants. The complaint alleges, among other things: "That one of defendants' employees was stationed on the bank of said pit, in full view of all points and places therein, to render signals to the engineer in charge of said engine, for the purpose of directing the movements and operations of said chains, boom, and derrick in the hoisting of said scales from said pit; that said pit was an ordinarily safe place in which to work, and said signalman was placed in position aforesaid to render such signals in directing the operation of said derrick and appurtenances thereto as would maintain such safety;" and, further, "that while plaintiff was in the act of hooking on said chains * * * to the scale, defendants by their servant, the said signalman, did carelessly and negligently, by signal given the aforesaid engineer, cause said scale to be suddenly hoisted from said pit without warning to said plaintiff, and before having received any signal from him, as was the custom when said scale was loaded and ready to be hoisted," in consequence of which plaintiff was injured.

The trial court submitted the case to the jury upon the theory that, though the signalman was a fellow servant of plaintiff, yet if he knew, when he gave the signal to the engineer, that plaintiff was in a position of danger and likely to be injured by starting the machinery in motion, his act in giving the signal was an act of defendants, for which they were liable.

It is well settled that a servant, whose duty under his employment consists in giving signals, under circumstances like those here pre-

sented, is not thereby charged with the performance of the master's absolute duties, and no liability attaches to the master for a signal negligently given. 2 Labatt, Master and Servant, 607, and authorities cited. The rule has, however, certain qualifications. If the employment be in character necessarily dangerous to the workmen, or likely to expose them to injury unless timely warned of impending danger, and thus afforded an opportunity to protect themselves, the master owes them the duty of giving the necessary warnings or signals as the situation may require. Wickstrom v. Whitney, 118 Minn. 416, 136 N. W. 1099; Savino v. Wheel Co., 118 Minn. 290, 136 N. W. 876. And again, when an "employee is at work in a place safe in itself, but which by some independent work done for the master's purposes becomes dangerous, unless prior warning of the impending danger be given, and when the master has required such notice to be given, or had assumed customarily to give it through an employee, the person charged with that duty is a vice principal." Anderson v. Pittsburgh Coal Co., 108 Minn. 455, 122 N. W. 794, 26 L. R. A. (N. S.) 624.

The case at bar does not come within either qualification of the rule stated. The complaint does not allege that the place of work was in itself dangerous, but, on the contrary, affirmatively alleges that it was ordinarily safe; nor is it alleged that the nature of the work, or the manner in which it was carried on, made the place unsafe. The place not being in itself dangerous, or made so by the character of the work, no duty to warn the employees arose as a matter of law, and there was no evidence that the signalman had been directed to give warnings or signals to the men in the pit, or to delay signaling the engineer until he had been in some manner advised by them that all was in readiness to raise the scale. There was some evidence of a custom by which the signalman waited for a word or sign from the pit, indicating that the chains had been attached and that the men were in a safe place, before signaling the engineer. But there was a conflict in the evidence upon the question, and it was not submitted to the jury. If such a custom existed, undoubtedly the men in the pit had the right to rely upon its observance for their protection, and a violation thereof by the signalman would constitute an act of negligence for which defendants would be liable. Anderson v. Coal Co., supra; Wickstrom v. Whitney, 118 Minn. 416, 136 N. W. 1099. The question was not submitted to the jury, and the evidence of the custom is far from conclusive in plaintiff's favor.

Since, therefore, the evidence did not, taken as a whole, present a case involving a violation of any of the master's absolute duties to plaintiff, within the rule of the cases cited, we have only to consider whether the learned trial court properly permitted a recovery upon the theory that, if the signalman knew that his act of signaling the engineer would expose plaintiff to injury, it was an act of negligence chargeable to defendants. We are unable to concur in that view of the law. In the absence of evidence showing a duty on the part of defendants to take affirmative action looking to the protection of the men in the pit, either because of the dangerous character of the work, or by a previously established custom, the signalman was a fellow servant, and the signal to the engineer a mere detail of the work. The case of Berneche v. Hilliard, supra, when viewed in the light of the facts there before the court, does not support the view of the trial court. What was said in that case in reference to the act of Hood in signaling the engineer, with knowledge that to do so would endanger the safety of plaintiff, was in view of the fact that Hood was the general foreman of the work, having full charge and control thereof, and presumptively charged with the performance of all the absolute duties of the master in respect to furnishing and maintaining a reasonably safe place in which the employees under his control were engaged at work. If in that case Hood had been a servant in the common employment, and not the general foreman of the work, or otherwise charged with a performance of the master's absolute duties, his act in knowingly exposing a fellow workman to injury would have been the wrong of a fellow servant, not chargeable to the master as an act of negligence. And it was because he was the general foreman, in full charge of the work, and presumptively clothed with the master's duty to maintain the place of work in reasonable safety, that we said in the Hilliard Case, in effect, that if he started the derrick in motion, with knowledge that to do so would expose employees to injury, he violated the master's duty to maintain the safety of the place of work, for which the master would be liable.

A foreman or superintendent is often reduced to the rank of a fellow servant by the character of the work performed. But a servant engaged in the common employment, and clothed by the master with no special authority or discretion, is never raised by implication of law to the position of vice principal, except in those cases where he is intrusted with work of a character which necessarily involves a per-

formance of some of the absolute duties of the master. This is illustrated by the cases heretofore cited. Such is not, however, the case at bar. The signalman in this case was not engaged in a work which, on the evidence presented and the view in which the case went to the jury, necessarily involved any of the nondelegable duties of the master. The signals given by him were mere details of the work, not chargeable to defendants.

The order appealed from must therefore be reversed, but it is not a case for final judgment.

Order reversed, and new trial granted.

HALLAM, J., having tried the case below, took no part.

NOTE.—*Giving Signals of Danger as Detail in Work Performed by Fellow Servants.*—The instant case seems to us to hold, by critical analysis, that assumption of risk as to ordinary dangers incident to employment is not precisely the same in employments in character necessarily dangerous and those which are not. In the former it is not an incidental detail of the work that signal of danger should be given, while in the latter it is. But is this a logical distinction? If there is a difference at all, so far as liability of master is concerned, it would appear to be in the fact that the absence of provision for proper signal in the former intimately relates to the question of the master furnishing or not a safe place to work. This obligation is measured by the duty of reasonable anticipation. In the latter character of work it might not be thought obligatory for the master to provide for signalling about danger. Therefore, as making provision for a safe place to work embraces signalling against danger in employments essentially dangerous, this becomes a non-delegable duty and its performance not an incident in the work; if employment is not thus, the signalling is incidental and, therefore, a detail of the work. Do the courts proceed on this theory? It does not seem thus in Minnesota in any prior decision to this. Thus take the case of Berneche v. Hilliard, 101 Minn. 366, 112 N. W. 392, where the employment was not in character essentially dangerous, and it says that if it affirmatively appeared that a foreman in work not necessarily dangerous saw that a signal should be given and was not, this would visit fault on the master. If he did not see this, there was an accident within ordinary risk. For this is cited Barrett v. Reardon, 95 Minn. 425, 104 N. W. 309. The distinction here is very dim—the foreman is a vice-principal if he actually sees the menace, and a fellow-servant if he does not. In the case the foreman gave a wrong signal when he did not see plaintiff's exposure to danger.

Take again Anderson v. Pittsburg Coal Co., 108 Minn. 467, 122 N. W. 794, 26 L. R. A. (N. S.) 624, where it cannot be said the employment was inherently dangerous, it was said, after quite an elaborate discussion: "The delegation of an employee or servant of the duty of taking such measures as are within the power of the master to protect other employees against dangers while at work cannot relieve the master from liability, if the employees to whom such duty is deputed do not exercise reasonable care in its discharge." This principle was, as we said, applied in a case where the employment was not necessarily dangerous.

The fact that this principle was considered broadly to apply appears from the dissent which the opinion in the Anderson case, *supra*, expresses about Portance v. Lehigh, 101 Wis. 574, 77 N. W. 875, 70 Am. St. Rep. 932, which case pointedly enforces the distinction between employments in their nature perilous and those not so.

There is another distinction that seems to be followed in the cases. First there are cases where there are perilous operations and it is a nondelegable duty and failure by a servant appointed to warn is the failure of a vice-principal. Lon Moor Iron Co. v. La Bianca, 106 Va. 83, 55 S. E. 532, 9 A. & E. Ann. Cas. 1177; Simone v. Kirk, 173 N. Y. 7, 65 N. E. 739; Hume v. Ft. Halifax Power Co. (Me.), 75 Atl. 300; Kentucky Block Cannel Coal Co. v. Nance, 165 Fed. 44, 91 C. C. A. 82; Archer Foster Const. Co. v. Vaughn, 79 Ark. 20, 94 S. W. 717. And then there are cases where there are irregular, but recurring dangers. Thus in Illinois Steel Co. v. Ziemkowski, 220 Ill. 324, 77 N. E. 190, 4 L. R. A. (N. S.) 1161, molten lead, in particles, would be thrown off at irregular periods. This made a place inherently dangerous and the vice-principal rule would apply. If, however, an occurrence involving danger is purely transitory, and not to be reasonably apprehended it is different. Pelaja v. Aurora I. M. Co., 106 Mich. 463, 64 N. W. 335, 32 L. R. A. 435, 58 Am. St. Rep. 505; The Queen, 40 Fed. 694. Of occurrence to be expected is firing of blasts in a mine. Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 81 N. E. 857; Hendrickson v. U. S. Gypsum Co., 133 Iowa 89, 110 N. W. 322, 9 L. R. A. (N. S.) 555. Also to warn about unexploded charges in a mine. Harker v. Iola Portland Cement Co., 76 Kan. 612, 93 Pac. 179; Stahl v. Duluth, 71 Minn. 341, 74 N. W. 143. See also Hill v. Nelson Coal Co. (Mont.), 104 Pac. 876; Shannon v. Consolidated Tiger & P. Min. Co., 24 Wash. 119, 64 Pac. 169.

And as to warning about blasts there is the opposite view. Donovan v. Ferris, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25; Kelly Island Lime & T. Co. v. Pachuta, 69 Ohio St. 462, 69 N. E. 988, 100 Am. St. Rep 706; Gallagher v. McMullin, 49 N. Y. Supp. 734, 25 App. Div. 571. These cases take the view of responsibility being met where a competent fellow-servant is delegated to warn.

In hoisting and hauling there is a divergence, though danger is not necessarily incident, but the occurrence is purely from fault in operation. Thus the Portance case holds a certain way, as we perceive, *supra*, and Ocean S. S. Co. v. Cheeney, 86 Ga. 278, 12 S. E. 351, and, as we think, the Anderson case, *supra*, the other. In accord with the Cheeney case seem to be Shaw v. Bambrick-Bates Constr. Co., 102 Mo. App. 666, 77 S. W. 96; Maine & N. H. Granite Corp. v. Hatchey, 173 Fed. 784, 97 C. C. A. 508. In Biggers v. Catawba Power Co., 72 S. C. 264, 51 S. E. 882, the distinction is clearly stated between its being the master's duty to provide warning and warning being given as to a transitory occurrence. In Westmoreland v. Rothschild, 53 Wash. 626, 102 Pac. 705, is also this

idea. This is enforced also in Brice-Nash v. Barton Salt Co., 79 Kan. 110, 98 Pac. 768, 19 L. R. A. (N. S.) 749.

It is tedious to pursue citation further. There is conflict in the cases. But it seems by majority view to be the case, that unless the master ought under his reasonable duty to provide signals, in the making of a place safe, servants appointed to give signals are not vice-principals.

C.

ITEMS OF PROFESSIONAL INTEREST.

REPORT OF DENVER BAR COMMITTEE ON PLAN FOR NON-PARTISAN SELECTION OF JUDGES.

To The Denver Bar Association:

The committee appointed by your president to devise ways and means for the selection of judges for the district bench in the First Judicial District in a non-partisan manner, begs leave to submit the following report, including a plan for accomplishing the end in view:

It is commonly believed, both by the profession and by the public generally, that the independence of the judiciary would be strengthened under our elective system if candidates for judicial honors were relieved from the necessity of entering the arena of political conflict. Under our system for the popular election of judges, candidates must by some means be chosen and their names submitted to the electorate. It is unquestionably true that the fitness of a lawyer for a judicial position is better known to his associates in the practice of law than to any other class of persons. Therefore, if some means could be devised by which this knowledge on the part of his professional associates could be impartially directed to the choice of a judicial candidate, such procedure would be a valuable adjunct in securing the selection of fearless and independent judges. To this end, the following plan is proposed:

1.—The Conditions Under Which the Plan Must Operate.—Under the act concerning nominations of candidates for public office and for political party positions, etc., approved October 17, 1910, and now in force, the name of every candidate which will appear upon the official ballot at the general election of November 5, 1912, must be placed there by nomination at a direct primary election which will be held in the month of September, or by certificate of nomination prepared and filed in accordance with the provisions of said act. All political parties will vote at the same direct primary. But the names of all candidates appearing upon the direct primary ballot must be placed upon such ballot under the provisions of the direct primary law. Nominations may be made by "assembly," including "political party assemblies," or by petition. Any candidate receiving ten per cent or more of the votes of the duly accredited delegates to any such assembly for any office to be voted upon at the ensuing election shall be certified to the primary election officers, and his name must be placed upon the direct primary ballot as a candidate for such office before the ensuing primary election.

Or should a candidate not appear before an assembly, or should he not receive the requisite ten per cent of the votes of the duly accredited delegates thereat, his name may be placed upon the direct primary ballot by petition.

Under these conditions, a comparatively simple way is open by which the bar candidates for judicial nomination can be voted on at the direct primary election. After a choice has once been made of five judicial candidates by the bar association, their names may be made to appear upon the direct primary ballot either by petition, or, preferably, by having their names submitted and voted upon at the assemblies of the respective political parties. It is not unlikely that such steps can be taken before the assembly of each political party that every candidate may receive the requisite ten per cent of the votes of the delegates to such assembly. In this way, the bar association candidates will appear upon the direct primary ballot under each party designation, and the adherents of every political party will have the opportunity at the direct primary election of making the bar candidates the candidates of their party.

Candidates voted on for the office of judge at the direct primary elections who receive a plurality of the votes cast shall be the respective party nominees for such respective offices.

The direct primary law makes provision for candidates for public office who do not wish to affiliate with any political party, as defined by that act, and such candidates may be nominated by petition and in the manner prescribed by the act. Therefore, should the bar association candidates not be chosen at the direct primary election as the candidates for the respective political parties, the way will yet be open for the placing of their names before the electorate at the general election of November fifth. However, it should be the aim of the association so to conduct its campaign that its candidates should become the candi-

dates of each of the leading political parties, thus insuring their election in November, free from any substantial political contest.

2.—The Plan Proposed.—After a thorough consideration of various plans proposed, your committee is of the opinion that the selection of bar association candidates should be accomplished in the most mechanical and automatic manner possible, in order to eliminate every suggestion of personal influence or control. To this end, no member of the bar should in the first instance be requested to offer himself as a candidate, and no bar association committee or other combination of individuals should be required to make selections or pass upon the fitness of candidates.

To accomplish this purpose, every member of the bar must in the first instance be deemed a possible candidate. A preliminary or selective nominating election must be held, to be conducted, let us say, by the judiciary committee of the bar association, substantially as follows:

(a) A registry list will be made up, upon which will appear the name of every member of the bar of the city and county of Denver in good standing.

(b) An election date will be fixed, and at said election, between the hours of nine a. m. and five p. m.—the judiciary committee acting as judges of election—each member of the bar whose name appears upon such registry list shall appear before said judges at the designated voting place and cast a secret ballot on which the voter shall place the name of five candidates.

(c) At the closing of the polls, the judges shall count the votes, making a list thereof, and placing the number of votes cast for each candidate opposite his name.

(d) Should any one or more of the candidates voted for up to five, receive a majority of all of the qualified voters, i. e., a majority of all of the members of the bar in good standing, whose names appear upon the said registration list, such person or persons shall be deemed the nominee or nominees of the bar association, provided they be willing to accept such nomination. Should one or more persons, up to five, receive a majority of all of the qualified votes as aforesaid, the judiciary committee shall then wait upon such persons and ascertain their willingness to become the bar association candidates. Should the requisite acceptances be secured, the person or persons so accepting shall be deemed the bar association candidates, and no further voting with respect to such persons shall be required.

3.—The Second and Subsequent Elections.—(e) If five candidates be not secured by the procedure aforesaid, the judiciary committee shall wait upon each person voted for at said preliminary election, and ascertain his willingness to permit his name to be further voted upon as a prospective bar association candidate.

(f) Up to this point in the election procedure, the names voted upon and appearing upon the ballots cast at the preliminary election aforesaid shall be held in confidence by the election officers, the said judiciary committee, and kept secret to the end that no member of the bar may feel aggrieved by the use of his name without his consent.

(g) The judiciary committee, having waited upon each person voted for, as provided in subdivision (e) aforesaid, and having secured the consent of those willing to become bar association candidates, a list of all such persons shall forthwith be prepared and mailed to each member of the bar qualified to vote as aforesaid, together with a notice of the date and place for the second election.

(h) At the second election thus fixed, all qualified voters shall again cast their secret ballots with five names thereon (or less in accordance with the number, if any, chosen at the preliminary election), selected from the list submitted as aforesaid.

(i) At the opening of the polls, the judges shall count the ballots cast and publicly declare the result thereof, and any one or more candidates, up to five or less, as the case may be, receiving a majority of all of the votes cast at said election, shall be declared to be the choice of the bar association as its judicial candidates.

(j) Should such second election not result in the choice of five candidates (including those which may have been selected at the first election, if any), a third election shall be called and held by the judiciary committee in like manner as said second election. And so on, successive ballotings shall be taken until five candidates receive the majorities necessary to secure a choice; it being a condition of choice that each candidate receive a majority of all the votes cast at any election subsequent to the first election.

4.—Procedure.—In all of its procedure, the judiciary committee shall be governed by such rules and regulations as will preserve the secrecy of the ballot and secure a fair and impartial election.

5.—The Bar Association Campaign.—When five candidates have been selected, as aforesaid, the bar association, through the requisite

committees, shall see to it that the names of such candidates are presented to and voted upon at the respective political conventions or assemblies, which may be held prior to the direct primary election in the month of September, 1912, to the end that the bar association candidates may become, without further contest, the candidates of each political party, as declared at the direct primary election.

6.—The Selection of Candidates by Petition.—Should the bar association candidates fail of nomination at the direct primary election, the bar association shall take such steps, through duly constituted committees, as may be necessary to place the names of such candidates upon the general election ticket at the general election of November 5, 1912, otherwise than by the direct primary election and in the manner provided by the act of October 17, 1910.

EDWARD C. STIMSON,
HARRY E. KELLY,
ERNEST MORRIS,
JOHN A. GORDON,
J. H. PERSHING,
H. N. HAWKINS,
H. L. RITTER,
Committee.

CORRESPONDENCE.

NON-PARTISAN JUDICIARY—URGENCY OF REFORM IN JUDICIAL PROCEDURE.

Editor Central Law Journal:

I want to express my appreciation of an editorial in your issue of the 21st instant, under the caption, "Legislatures Moving for a Non-Partisan Judiciary," or rather that part of it in which you say, "The most vital question before the people to-day is, not the tariff, but efficiency in the administration of justice." The movement for a non-partisan judiciary may be all right. I haven't given it sufficient study to have an opinion either way. Prima facie, I scarcely think that it will solve the problem.

The chief complaint or cause of complaint against our judicial system is the delay in litigation. That is the one great cause of popular discontent with the law and lawyers. And, we may as well confess it, for it is obvious to us all, this complaint is a just one. And it must be remedied.

I have been interested in this question for many years, but about one year ago I began an investigation into the causes of delay and the best way to remove them. The result of these investigations is set forth in an address I delivered before the Lancaster County Bar Association, on January 25, 1913, at Lincoln, Neb. I enclose a copy of it. Use it or any part of it you choose. Most of what I have read on the subject has dealt with abstractions. The enclosed address suggests the concrete remedies. I drafted six (6) bills which were introduced in the Nebraska Legislature which is now in session, and all have been recommended for passage by the House Judiciary Committee. Several weeks ago our Supreme Court adopted, by rule, the identical thing provided for in one of these bills, viz., Division of the Supreme Court into two (2) divisions of four members each. Our Supreme Court consists of seven members, the Chief Justice is to sit in each division, thereby making the four members in each division. The unanimous decision of either division is the judgment of the Supreme Court of Nebraska. I think that the bill will pass, notwithstanding the belated adoption of this rule by the Supreme Court. The other five (5) bills relate to the procedure in trial courts, and their passage seems assured.

In the course of my investigation of this subject, I corresponded with lawyers from about fourteen states of the Union. Their letters showed a deep interest in the movement for the elimination of delay in our courts; but, with few notable exceptions, none had any remedies to suggest. Many asked me, however, to report to them the result of my investigations and my remedies. It would serve these a good turn if you would at least summarize the remedies outlined and proposed in my enclosed address.

In a single word, one thing is certain, and that thing is that the written demurrer to pleadings has got to go, and all motions must be summary; and that all appellate courts of more than three members each must sit in divisions. Investigate as you will, and philosophize till doomsday, all mere paper contests must be cut out, and the only contest that consumes a substantial period of time must be upon the merits. The people simply will not stand for any more of that nonsense. The judicial recall is upon us. We have got to clean house, and do it right away. The United States Supreme Court has pointed the way. The New Federal Equity Rules are filled with such expressions as "speed the cause," and with limitations upon the time within which acts in the course of litigation are to be done. Once, it was "ninety days," where now it is "twenty days." Now you must try your cause or it goes out of court.

These typewriter intensities may not be aesthetic, but they evidence at least my earnestness about the matter. We must have "greater efficiency in the administration of justice" or something is going to happen.

If it is not too late, some bills should be introduced in this session of every legislature to shorten the time of litigation. The legislature should say to the judges of trial courts: "When any question arises in a cause in the course of making up the issues, you must decide it summarily." If one has curious constitutional objections to that kind of language from the legislature to a co-ordinate branch of the government, the wording can be changed to apply to the litigant, as my bills provide. When the several Statutes of Jeofails and Amendments were passed, the legislative power that enacted them into law, strangely did not limit the time. When the device of respondeat ouster was invented, the same omission was made. All amending and pleading over should be done in twenty-four hours. The judgment upon the cause itself is always in the hands of the court and no irremediable wrong can be done.

What we need, as a rule, is not more judges,

but less nonsense from those we have. And, rest assured, the legislature can help.

Very truly,

W. M. CAIN.

Schuyler, Neb.

Note.—We reproduce with great pleasure the letter of our correspondent.

We do not believe a non-partisan judiciary is a panacea for all ills. The best of men for judges may not be able to eliminate the evils in a bad system. But a bad system more needs good men to lessen its evils than does a good one for its smooth running. A good judge is a blessing in any situation, and a bad one is an affliction. If you take politics away from his selection, his personal merit will be the only criterion for consideration; and that is as it should be. If it is a disgrace for a judge to show partisanship on the bench, why is it not an evil for politics to have anything to do with putting him there? We hope to present more in detail some of our correspondent's views. This is the legislative season, and we intend, when it has passed, to show in a comparative way what the different states have done for reform in judicial procedure.—Editor.

REFORMING PROCEDURE — SIMPLIFYING THE TAKING OF APPEAL.

Editor Central Law Journal:

In your issue of October 25th, 1912, I notice an article, written by D. C. Lewis, of St. Johns, Oregon, commending appellate procedure in Kansas. Evidently Brother Lewis has not become acquainted with our revised 1909 code, as it provides a much simpler method of perfecting an appeal than our former "case-made" procedure. Under our new code, either party may appeal from a final order by simply serving notice thereof on the adverse party and then filing the notice with the clerk of the trial court. This perfects the appeal and the clerk then files a certified copy of the notice, with a certified copy of the final order, in the office of the Clerk of the Supreme Court. The appellant may then have the official court stenographer transcribe the testimony or such part as is deemed necessary to present the case to the appellate court. This transcript is filed with the Clerk of the trial court. The appellant may then prepare a printed abstract of the record and proceedings, or such part thereof as he may deem necessary for the consideration of the appellate court and file twenty copies with the clerk. The adverse party may then file a counter abstract if he so desires. Both sides may then file briefs, the appellant serving his on the adverse party forty days before the hearing in the appellate court and the appellee ten days before the hearing. Other states may well copy after Kansas.

ARTHUR M. JACKSON.

Leavenworth, Kansas.

BOOKS RECEIVED.

American Annotated Cases containing the cases of general value and authority subsequent to those contained in American Decisions, American Reports asd the American State Reports. Thoroughly annotated. Volume A 1913. Price, $5.00. San Francisco, Cal., Bancroft-Whitney, also Northport, L. I., N. Y. Edward Thompson Co. Review will follow.

Medical Men and the Law. A modern treatise on the legal duties and liabilities of physicians and surgeons by Hugh Emmett Culbertson, of the Ohio and New York Bars, contributing editor to the Laning, Ohio, "Encyclopaedic Digest," "Notes on the American Decisions and Reports" and many other legal publications. Price, $3.00 net. Philadelphia and New York. Lea & Febiger. Review will follow.

Missouri Form Book, by Everett W. Pattison of the St. Louis Bar, author of Forms for Missouri Pleading, instructions in Criminal Causes in Missouri, etc. Second Edition revised by W. W. Herron of the St. Louis Bar. Price, $6.50. Kansas City, Mo., Vernon Law Book Company. Review will follow.

HUMOR OF THE LAW.

"You are charged with selling adulterated milk," said the judge, according to Judge.

"So I understand, your Honor," said the milkman. "I plead not guilty."

"But the testimony shows that your milk is 25 per cent water," said the judge.

"Then it must be high-grade milk," returned the milkman. "If your Honor will look up the word 'milk' in your dictionary you will find that it consists of from 80 to 90 per cent water. I'd ought to have sold it for cream."

This story is told of B. M. Allen, the famous criminal lawyer of Birmingham, Alabama. A negro client entered his office and said: "Mr. Allen, my brother is in jail and I want to see what it will cost to get him out."

The rapid growth of Birmingham had made the building of a large new jail imperative, and an imposing stone structure took the place of the old one, which was known as "the little brick jail." At the time Mr. Allen was being consulted the little jail had not been in use for a long time, except as a storage warehouse.

When his negro client stated the facts, Mr. Allen saw it was a weak case, and that it would be easy to acquit the prisoner, and replied: "I can get him out all right, Sam, and it will cost you $25, but I won't turn a wheel until you go out and raise the money"—that being the customary way of securing fees from the average negro.

Sam happened to be a thrifty negro. He had that very day sold a farm for a large sum and had the money in his pocket. He pulled out a roll from his trousers pocket large enough to choke a horse, and began to peel off a $20 bill, when Mr. Allen interrupted: "Look here, Sam! Is your brother in the little red brick jail or the big jail?"

"He's in de big jail, Mr. Allen," replied Sam.

"Oh, I thought you meant the little jail," said Mr. Allen. "It'll take $50 to get him out of the big jail." And Sam paid the fee cheerfully.—Nat. Corporation Reporter.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Attorney and Client**—Confidential Relations.—An attorney and client sustain relations of trust and confidence very much the same as trustee and cestui que trust commonly do.—Ott v. Hood, Wis., 139 N. W. 762.

2. **Bailment**—Burden of Proof.—In an action on a contract of nongratuitous bailment, where defendant admitted the receipt of the property and his inability to return it, a prima facie breach was established; and it devolved on defendant to prove ordinary care in keeping the property.—Travelers' Indemnity Co. v. Fawkes, Minn., 139 N. W. 703.

3. **Bankruptcy**—Ancillary Proceeding.—Where goods of a bankrupt alleged to have been fraudulently conveyed were taken into the possession of an ancillary receiver, the court appointing such receiver acquired jurisdiction to determine the validity of the transfer and the rights of the parties.—In re Lipman, U. S. D. C., 201 Fed. 169.

4.——Books and Papers.—Where creditors of a bankrupt corporation contend that another corporation is in fact the bankrupt under another name, the bankruptcy court has jurisdiction to order such other corporation to produce its books and papers before the special master on the hearing of orders to show cause why the receiver should not be extended over the property of such company.—In re Ironclad Mfg. Co., C. C. A., 201 Fed. 66.

5.——Chattel Mortgage.—A chattel mortgage on a bankrupt's changing stock of goods, authorizing the bankrupt to retain possession and sell the same without accounting to the mortgagee, held invalid as against the bankrupt's creditors and receiver.—In re Noethen, C. C. A., 201 Fed. 97.

6.——Conditional Sale.—Where no title passed to a buyer in a conditional sale contract because of his failure to pay the price prior to his becoming a bankrupt, no title passed to his trustee.—Southern Hardware & Supply Co. v. Clark, C. C. A., 201 Fed. 1.

7.——Discharge.—A false statement in writing of the assets and liabilities of a bankrupt firm, made by the firm's managing agent, to obtain credit for the firm, held available to bar a discharge in bankruptcy of the members of the firm.—In re Schwartz & Co., U. S. D. C., 201 Fed. 166.

8.——Discharge.—Where a bankrupt's discharge was denied because of alleged concealed assets, subject to the right to move for reargument in case it was determined that the assets did not belong to the bankrupt, the discharge would be finally denied.—In re Cohen, U. S. D. C., 201 Fed. 188.

9.——Expunging Claim.—On the petition by a trustee in bankruptcy to expunge a creditor's claim on the ground of preference, the burden is on the trustee of proving that the preferential payment was received after information of the insolvency of the bankrupt.—In re Frazin, C. C. A., 201 Fed. 86.

10.——Fraudulent Conveyance.—A bankrupt's trustee has a transferable interest in real estate owned by the bankrupt and transferred by him in fraud of creditors, more than four months prior to bankruptcy proceedings, with authority to vest in the assignee the right to sue to set aside the conveyance.—In re Downing, C. C. A., 201 Fed. 93.

11.——Judgment Creditor.—A bankrupt's trustee is vested with all the rights, remedies, and powers of a judgment creditor having an execution returned unsatisfied, and may set aside a fraudulent transfer and apply the proceeds to the payment of debts.—In re Downing, C. C. A., 201 Fed. 93.

12.——Place of Business.—One employed at small salary as rate clerk and attorney in fact, and to indorse bank paper, has no "place of business" within Bankr. Act July 1, 1898, § 2, relating to jurisdiction of bankruptcy proceedings.—In re Lipphart, U. S. D. C., 201 Fed. 103.

13.——Practice.—The remedy by appeal, and that by petition for revision, are mutually exclusive.—In re Martin, C. C. A., 201 Fed. 31.

14.——Practice.—Where adverse title is claimed to property of a bankrupt under a transfer antedating bankruptcy, it can be tried only in a plenary suit; but, if the property is in the physical possession of a third party who refuses to deliver it to the trustee, the validity of such claim may be determined by the bankruptcy court in summary proceedings.—In re Cantelo Mfg. Co., U. S. D. C., 201 Fed. 158.

15.——Practice.—Having assigned patents to a corporation, organized to manufacture and exploit them in consideration of the transfer to the patentee of a large portion of the corporation's stock, the patentee thereafter held the patents only as an officer of the corporation and on bankruptcy intervening was properly required to transfer them to the trustee by summary proceedings.—In re Cantelo Mfg. Co., U. S. D. C., 201 Fed. 158.

16.——Preference.—Where a note of bankrupt was presented at a bank, and there certi-

fied and subsequently paid, the time of certification is to be taken as the time of payment in determining whether there was a preference.—In re Frazin, C. C. A., 201 Fed. 86.

17.——Trustee's Title.—A bankrupty's trustee is vested with the bankrupt's title to all property which either he could have transferred, or which might have been levied on and sold under judicial process, except property exempt under the laws of the state.—In re T. C. Burnett & Co., U. S. D. C., 201 Fed. 162.

18. **Banks and Banking**—Depositors.—Some of the depositors and stockholders of a bank may, on behalf of all of them, bring suit to charge its directors, as its managing officers, with sums lost through their negligence and mismanagement; it being in the hands of a receiver, and he refusing to bring the suit.—Ellis v. H. P. Gates Mercantile Co., Miss., 60 So. 649.

19. **Bills and Notes**—Accommodation.—A debtor may not sue on a note or check given by a third person for his accommodation for as to him it is a gratuity.—Neal v. Wilson, Mass., 100 N. E. 544.

20.——Collateral.—A transfer of negotiable paper as collateral for a debt less in amount than the paper is in due course and for a valuable consideration.—Masterson v. Ross, Tex., 152 S. W. 1156.

21.——Holder for Value.—Ordinarily the maker of a negotiable instrument procured through fraud going to its inception is liable to a bona fide purchaser for value without notice.—Garlitz v. Runnels County Nat. Bank, Tex., 152 S. W. 1151.

22.——Illegal Consideration.—"Immoral," as applied to the consideration of a note, means that which is contra bonos mores, having a mischievous or pernicious tendency, contrary to good morals, including acts hostile to the welfare of the general public.—Exchange Nat. Bank of Fitzgerald v. Henderson, Ga., 77 S. E. 36.

23.——Negotiability.—A note secured by mortgage, which authorizes the maker to anticipate payment of the whole or any part of the amount of the note, is not negotiable.—Pierce v. Talbot, Mass., 100 N. E. 553.

24.——Negotiability.—A recital in a promissory note that it is secured by a mortgage did not affect its negotiability, where there were no stipulations or conditions in the mortgage inconsistent with or repugnant to the terms of the note.—Judy v. Warne, Ind., 100 N. E. 483.

25.——Uniform Negotiable Instruments.—The purpose of the uniform negotiable instruments law was to secure uniformity by wiping out differences in minor details and not to make radical changes in the fundamental principles of the law.—State Bank of La Crosse v. Michel, Wis., 139 N. W. 748.

26. **Carriers of Goods**—Delay.—Railroad companies are not responsible for delays occasioned by accidents, but are responsible where such delays are attributable to their own negligence.—St. Louis & S. F. R. Co. v. Dean, Tex., 152 S. W. 1127.

27.——Notify Order.—Where an owner takes a bill of lading, "order (consignee) notify" C., and attaches a draft thereto, and delivers it to a bank for value, the title to the goods passes to the bank, and the carrier is liable to the bank for conversion if it delivers such shipment without surrender of the bill of lading.—Canandaigua Nat. Bank v. Cleveland, C., C. & St. L. Ry. Co., 139 N. Y. Supp. 561.

28.——Switching Railway.—A company operating a mere switching railway, transporting cars to and from trunk lines upon the basis of a division of profits, may be an interstate carrier.—W. H. Aton Piano Co. v. Chicago, M. & St. P. Ry. Co., Wis., 139 N. W. 743.

29. **Carriers of Passengers**—Directed Verdict.—In an action for injuries to a passenger, where the evidence, taken in its aspect most favorable to plaintiff, shows that the accident occurred either by reason of the sudden stopping of the car to avoid collision with an ice wagon, which had come without warning in front of the car, or a sudden stopping coupled with an unexplained collision, a verdict was properly directed for defendant.—Niland v. Boston Elevated Ry. Co., Mass., 100 N. E. 554.

30.——Res Ipsa Loquitur.—A carrier's negligence cannot be found from the bare fact that there was an unusual lurch of the car, and that injury to a passenger resulted. The passenger, to recover, must show, by evidence of what the motorman did, or what occurred, that the motorman was negligent.—Young v. Boston & N. St. Ry. Co., Mass., 100 N. E. 541.

31.——Statutory Fare.—An honest mistake of a railroad company as to the distance between its stations will not excuse it for charging more than the statutory fare for the actual distance traveled.—Chicago, R. I. & P. Ry. Co. v. McDermott, Ark., 152 S. W. 983.

32. **Chattel Mortgages**—Estoppel.—Where a seller agreed with the buyer that the latter might borrow from a third person the money for the cash payment and secure it by a chattel mortgage on the property, it was inequitable to hold the purchase-money mortgage superior to the mortgage to the third person.—J. H. & J. T. Pace v. J. M. Radford Grocery Co., Tex., 152 S. W. 1130.

33.——Foreclosure.—A chattel mortgagor may not deduct from the proceeds of a sale of the mortgaged chattels the expenses incurred by him in the management and keeping of the chattels.—Rodgers v. Sturgis Nat. Bank, Tex., 152 S. W. 1176.

34.——Lien.—While the lien of a pledge depends upon possession as between the parties, a chattel mortgage is valid though mortgagor retains possession.—Rairden v. Hedrick, Mont., 129 Pac. 498.

35. **Contempt**—Crime.—Where an act constitutes both a contempt and a crime, it may be punished both summarily and by indictment.—Merchants' Stock & Grain Co. v. Board of Trade of City of Chicago, C. C. A., 201 Fed. 20.

36. **Contracts**—Burden of Proof.—The law presumes that a person's contracts are valid and were entered into voluntarily, and one seeking to cancel a contract on the ground of fraud or undue influence has the burden of establishing the same.—Wherry v. Latimer, Miss., 60 So. 642.

37. **Copyrights**—Infringement.—A booklet entitled "Opera Stories," consisting of mere fragmentary statements of the story and characters of the operas, taken from descriptions other

than the librettos, was not an infringement of the copyrights on the librettos.—G. Ricordi & Co. v. Mason, U. S. C. C., 201 Fed. 182.

38.——Equity.—Neither law nor equity will permit one corporation to deprive another of the means of paying its debts by taking all or its property, and enabling it to dissolve its corporate existence, without also assuming its liabilities.—Meridian Light & Ry. Co. v. Catar, Miss., 60 So. 657.

39.——Receiver.—The court has power to remove a corporate receiver who is guilty of such conduct in connection with the receivership that the court cannot have confidence in his integrity of purpose in acting as a receiver, and where he is hostile to his coreceiver.—Horton v. Thomas McNally Co., 153 N. Y. Supp. 643.

40.——Unpaid Subscription.—A judgment creditor of an insolvent corporation may maintain an action against the stockholders for their unpaid subscriptions.—Barnard Mfg. Co. v. Ralston Milling Co., Wash., 129 Pac. 389.

41. **Courts**—Stare Decisis.—A single decision can seldom serve as a basis for stare decisis where opposed to previous decisions, especially where they are overruled without being referred to as if they had escaped the attention of the court.—Quaker Realty Co. v. Labasse, La., 60 So. 661.

42. **Criminal Law**—Character.—"Character" of an accused means his fixed disposition or tendency, as shown by his habits, through the manifestation of which his general reputation, good or otherwise, is obtained.—Keith v. State, Tenn., 152 S. W. 1029.

43. **Damages**—Avoidance of.—While an owner cannot recover for damages to his property that were avoidable by his use of reasonable precautions, he need not take unreasonable steps, nor commit a wrongful act, nor trespass upon the property of another to mitigate the damages.—Fairfield v. City of Salem, Mass., 100 N. E. 542.

44.——Trespass.—Where defendant continued to persistently trespass over a boundary line established in a processioning proceeding, the injury was to property, and not a personal tort; and hence plaintiff could not recover punitive damages as for an injury to his peace, happiness, and feelings.—Stovall v. Caverly, Ga., 77 S. E. 29.

45. **Dedication**—Prescription.—Dedication of land as a street and its acceptance may be shown by long-continued use, and by acts of authority exercised by the municipality, and record evidence is unnecessary.—Southern Ry. Co. in Kentucky v. Caplinger's Adm'r, Ky., 152 S. W. 947.

46.——Prescription.—Though a highway was not legally laid out, the silent acquiescence of the abutting owners in the use of a strip of land for a highway for more than 50 years amounts to a dedication.—Christianson v. Caldwell, Wis., 139 N. W. 751.

47. **Deeds**—Construction.—When the description in a deed is doubtful, the courts should assume the position of the parties, and the words should be read and interpreted in the light of the circumstances, and a deed is not to be held void for uncertainty, if by any reasonable construction it can be made available.—Scott v. Dunckel Box & Lumber Co., Ark., 152 S. W. 1025.

48.——Covenant.—Where it is doubtful whether a clause in a deed is a condition or a covenant, it will be construed to be a covenant, leaving the grantor to his action for damages for its breach.—Rockwell v. Utz, 139 N. Y. Supp. 529.

49.——Habendum Clause.—A provision in the habendum clause of a deed that the property was to be held so long as used for gin and mill purposes was a conditional limitation and not strictly a condition subsequent.—McBride v. Farmers' & Merchants' Gin Co., Tex., 152 S. W. 1135.

50. **Divorce**—Condonation.—In an action for divorce for adultery, the wife, who admitted adultery, but set up condonation, had the burden of proving it.—Redding v. Redding, N. J., 85 Atl. 712.

51.——Cruel Treatment.—Where there was evidence that the husband's repeated accusations of adultery caused the wife to become so ill as to make it necessary for her to keep in bed at times as long as two weeks, it was "cruel treatment" within Civ. Code 1910, 2946, defining it as such treatment as justifies apprehension of danger to life or health.—Miller v. Miller, Ga., 77 S. E. 21.

52. **Dower**—Dowable Interest.—In the absence of a statute authorizing it, a widow has no dowable interest in land purchased and conveyed to third persons to defraud judgment creditors.—Johnson v. Johnson, Ark., 152 S. W. 1017.

53. **Electricity**—Res Ipsa Loquitur.—That a street lamp, from contact with which plaintiff's intestate received an electric shock causing his death, had in some way become lowered from its normal position was not evidence of negligence, or that it fell by reason of some defect in the apparatus which held it in place.—Huscher v. New York & Queens Electric Light & Power Co., 139 N. Y. Supp. 537.

54. **Eminent Domain**—Measure of Damages.—The damages cannot be measured by the value of the property to the party condemning it nor by its need of that particular property.—Lambert v. Giffin, Ill., 100 N. E. 496.

55.——Shade Trees.—If the land on which shade trees adjacent to a sidewalk stood was owned by the abutting property owner, the city could only cut the trees by condemning the land upon paying a just compensation.—Glauque v. Salt Lake City, Utah, 129 Pac. 429.

56. **Evidence**—Judicial Notice.—The court will not as a matter of common knowledge determine that there are no spark arrestors which will prevent the emission of live sparks from the smokestack of a locomotive.—Schlag v. Chicago, M. & St. P. Ry. Co., Wis., 139 N. W. 756.

57. **Executors and Administrators**—Appointment.—Appointment of decedent's brother as his administrator before the expiration of the 40 days within which his widow and children were entitled to apply for letters held valid as against collateral attack.—Koloff v. Chicago, M. & P. S. Ry. Co., Wash., 129 Pac. 398.

58.——Succession Tax.—The American executors of an English subject leaving personalty in this country from which bequests were made properly deducted the succession tax required by the laws of England, before paying over such bequests.—In re Hellins, 139 N. Y. Supp. 713.

59.——Waiver.—Where an executor adopted the pleadings of special administrator in action on claim, and did not plead the nonpresentation of the claim to the executor, such presentation was not waived; the executor having no power to waive any requirement of the statute.—Ward v. Magaha, Wash., 129 Pac. 395.

60. **Forcible Entry and Detainer**—Trustee.—That plaintiff in an action for forcible detainer held the title as trustee for another cannot be set up as a defense by one wrongfully in possession, where under the trust plaintiff was entitled to possession.—Meier v. Hilton, Ill., 100 N. E. 520.

61. **Fraud**—Pleading.—In an action for fraudulent misrepresentations, the pleader must show by appropriate allegations his pecuniary injury.—Ott v. Hood, Wis., 139 N. W. 762.

62. **Frauds, Statute of**—Partnership.—A partnership formed under a partly executed oral

agreement that it shall continue for not less than three years exists until dissolved, notwithstanding the statute of frauds.—Doudell v. Shoo, Cal., 129 Pac. 478.

63. **Husband and Wife**—Fraudulent Conveyances.—A conveyance without consideration by a man on the eve of his marriage without the knowledge of his prospective wife and with intent to deprive her of her marital rights, will be set aside in equity so far as it conflicts with such rights.—Hanson v. McCarthy, Wis., 139 N. W. 720.

64.——Gift.—Where a husband insures his life in favor of his wife, the policy becomes her separate property, and premiums paid by the husband will be considered as gifts to the wife.—Kelly v. Kelly, La., 60 So. 671.

65.——Separate Estate.—Where a husband treats stock held by his wife as though owned by a feme sole, and does not assert his right to its possession and income, he will be deemed to have divested himself of his marital statutory rights over it, and to have vested her with its sole and separate estate.—Bidwell v. Beckwith, Conn., 85 Atl. 682.

66.——Tenancy by Entirety.—The fee in the street in front of property of tenants by the entirety is in both, subject to the public easement, and the consent of the husband to a private party to put pipes therein is not binding on the wife.—Wightman v. Cottrell, 139 N. Y. Supp. 564.

67. **Injunction**—Employe.—Though a contract for services as a piano salesman and collector provided that defendant should not work for any other firm, held that, where it did not appear that he was peculiarly fitted for the services or that they were in any way extraordinary, no injunction would lie to prevent a breach of his agreement.—Rosenstein v. Zentz, Md., 85 Atl. 675.

68. **Insurance**—Renewal.—In renewal policy of accident insurance, warranty of truth of statements made when the original policy was issued, and copied in the renewal policy, held to relate to conditions as they existed when the statements were originally made.—Fidelity & Casualty Co. v. Meyer, Ark., 152 S. W. 995.

69.——Undue Influence.—One seeking to cancel a new mutual benefit certificate changing the beneficiary on the ground of the member's mental incapacity and the undue influence of the new beneficiary has the burden of proving mental incapacity or undue influence.—Wherry v. Latimer, Miss., 60 So. 642.

70. **Judgment**—Amendment. — Where judgment for an amount in excess of the jurisdiction of the court is entered, it has no jurisdiction thereafter to cure the defect by a deduction so as to bring the amount within its jurisdictional limit.—Juster v. Court of Honor, Minn., 139 N. W. 701.

71.——Collateral Attack.—In collateral attack upon a judgment rendered against a nonresident, held that it would be presumed that a sufficient affadavit justifying the issuance of a warning order was filed, though the affidavit in the files was insufficient.—Kreiger v. Sonne, Ky., 152 S. W. 936.

72. **Landlord and Tenant**—Holding Over.—Where a tenant from year to year holds over, the landlord may either treat him as a wrongdoer, and eject him without notice, or may waive the right to possession, and recover the rent for another year on the ground that by holding over he has become a tenant for another year.—In re Steele 139 N. Y. Supp. 550.

73. **Libel and Slander**—Justification.—Only the truth will justify a slanderous charge of theft, so that it is immaterial that defendant honestly believed on probable cause that his charge was true.—Villeret v. Jeffer, La., 60 So. 669.

74. **Limitation of Actions**—Attorney and Client.—Failure of an attorney to remit proceeds of a collection made by him perfects a cause of action in favor of the client, which starts the six-year limitations running, without a precedent demand and refusal.—Ott v. Hood, Wis., 139 N. W. 762.

75.——Law of Forum.—The statute of limitations of the country in which a contract is sought to be enforced, rather than of the place of the contract, applies, unless the contract has been previously extinguished by the law of the latter.—State Bank of West Pullman v. Pease, Wis., 139 N. W. 767.

76. **Malicious Prosecution.**—Bad Faith.—That a person disclosed to the district attorney information tending to show another guilty of a crime, but failed to disclose all his information, held not to show malice or bad faith, in absence of intentional concealment.—Vicksburg, S. & P. R. Co. v. Porterfield, Miss., 60 So. 652.

77. **Marriage**—Cohabitation.—Where husband and wife after their divorce, maintain separate abiding places, the fact that for two years after the divorce they occasionally stayed at the same house, and that the former husband contributed to the wife's support, and spoke of her as his wife, did not constitute such cohabitation as created a common-law marriage.—O'Malley v. O'Malley, Mont., 129 Pac. 501.

78. **Master and Servant**—Assumption of Risk.—In an action for the wrongful death of his intestate, plaintiff has the burden of proving that deceased did not assume the risk of the accident.—Fowlie's Adm'x v. McDonald, Cutler & Co., Vt., 85 Atl. 692.

79.——Assumption of Risk.—A trackwalker employed to walk over and watch tracks and repair small defects while there is a constant passing of trains assumes the risk of injury by being struck by trains properly operated, and he must adopt for his self-protection reasonable safeguards.—Connelley v. Pennsylvania R. Co., C. C. A., 201 Fed. 54.

80.——Assumption of Risk.—An employe does not as a matter of law, assume the risk of injury from a defective guy rope where the defect is not observable by inspection, and where the safety of the rope may only be tested by means not available to him.—Bruce v. Northern Boiler & Structural Iron Works, Wis., 139 N. W. 729.

81.——Ordinary Care.—In a personal injury action by a servant, a charge that the degree of care which should be used by the master in procuring reasonably safe machinery and appliances is to be considered with the risk to be incurred does not furnish the proper guide to the jury.—Van Geem v. Cisco Oil Mill, Tex., 152 S. W. 1108.

82.——Safe Place.—A master is not bound to furnish his servant with a reasonably safe place to work, where the place of work is a chamber in a mine which is constantly shifted and being transformed as the direct result of the employe's labor.—Proctor Coal Co. v. Beaver's Adm'r., Ky., 152 S. W. 965.

83.——Signals.—A servant whose duty it is to give signals is not charged with performance of the master's absolute duties, unless the employment is necessarily dangerous, or the employe is at work in a place safe in itself, and which by independent work for the master's purposes becomes dangerous, unless warning be given.—Burke v. Ash, Minn., 139 N. W. 705.

84.——Warning.—Though it was not negligent to place a band saw in its position, yet, if the danger was not so obvious that a reasonably prudent man, suddenly called upon to perform a service near it, would be apt to discover it and appreciate it, then there was a duty to warn one called upon for such service, and that whether such servant was an infant or a man of mature years.—Michigan & Arkansas Lumber Co. v. Bullington, Ark., 152 S. W. 999.

85. **Mechanics' Liens**—Subcontractor.—Owner's agreement with subcontractor not to reduce amount due principal contractor by claiming liquidated damages for delay in performance held to inure to the benefit of person furnishing materials to subcontractor.—Schloss v. Froman, 139 N. Y. Supp. 616.

86. **Mines and Minerals**—Severance.—Where there has been a severance between the surface of the soil and the minerals underneath, the owner of the surface, by carrying on mining operations, has no adverse possession of the minerals remaining in the land.—White v. Miller, 139 N. Y. Supp. 660.

87. **Parent and Child**—Emancipation.—Parental power over a minor child is lost by the parent consenting that the child receive the

proceeds of his own labor.—Mathews v. Fields, Ga., 77 S. E. 11.

88. **Partnership**—Action Against.—An action for the price of goods sold a firm is transitory, and service of process on a partner in the county in which the action is brought gives the court jurisdiction of the co-partner served in another county.—George Bohon Co. v. Moren & Sipple, Ky., 152 S. W. 944.

89.——Agency.—Where one sells goods to a partner for use in the firm business, the partners are liable, though at the time of the sale the seller did not know of the firm.—George Bohon Co. v. Moren & Sipple, Ky., 152 S. W. 944

90.——Dissolution.—Where a partner agreed to furnish certain credit as his only contribution to the firm and later withdrew the credit, the other consenting thereto, the partnership was dissolved.—Mitchell v. Murphy, La., 60 So. 677.

91.——Estoppel.—A partner, who for years has remained silent with reference to the character of the business done by the firm, is estopped to deny that his partner was acting within the scope of the firm's business in purchasing and selling cotton.—W. B. Thompson & Co. v. Gosserand, La., 60 So. 682.

92. **Powers**—Domicile.—Where a power is a purely beneficial power, or assets of the donee, the lex loci domicilii of the donee may govern the construction of the testamentary execution and distribution under the will.—In re New York Life Insurance & Trust Co., 139 N. Y. Supp. 695.

93. **Principal and Agent**—Building Bond.—It was not necessary that a building contractor's bond should mention both obligees where the land on which the house was to be erected was described in both contract and bond, and the date of the contract was given in both.—Christensen v. Hamilton Realty Co., Utah, 129 Pac. 412.

94.——Set Off and Counterclaim.—Principal held entitled to offset against agent's commission the amount which he was damaged by the agent's purchasing wheat at a price, and on terms, and in part of a kind, not authorized by the principal.—Sheeran v. Ford Grain Co., Wash., 129 Pac. 378.

95. **Principal and Surety**—Extension.—Where, for value received, a surety consents that a creditor may extend the note on which he is surety, the surety cannot, by giving notice to collect the note from the principal, revoke his consent, and be discharged from liability.—Armour Fertilizer Works v. Bond, Ga., 77 S. E. 22.

96. **Railroads**—Fencing Track.—Failure of railway company to fence its track as required by statute is evidence of negligence.—Kommerstad v. Great Northern Ry. Co., Minn., 139 N. W. 713.

97. **Release**—Mutual Mistake.—To invalidate a release because of mutual mistake, it must relate to a past or present fact material to the contract, and not to an opinion as to future conditions.—Tatman v. Philadelphia, B. & W. R. Co., Del., 85 Atl. 716.

98. **Sales**—Condition Precedent.—Where a buyer is by the contract required to do something as a condition precedent to the passing of the title, the title will not pass until the condition is fulfilled, though there is a delivery.—Southern Hardware & Supply Co. v. Clark, C. C. A., 201 Fed. 1.

99.——Fraud.—A written contract for the sale of a stock of goods, though expressly providing that the seller did not warrant the quantity, may be set aside because of his fraudulent misrepresentations as to quantity.—Kirby v. Thurmond, Tex., 152 S. W. 1099.

100.—Reasonable Time.—Where one orders a a belt, saying that he desired it by a certain day and the other party said he would try to have it ready then, but did not have it ready until the day following, the same being within a reasonable time after the order, the right of rescission did not exist.—Morse v. Canaswacta Knitting Co., 139 N. Y. Supp. 634.

101.——Repudiation.—Where purchaser of personal property wired seller insisting on delivery at New York, although contract provided for delivery in a foreign country, this was an unqualified repudiation of the contract in anticipation of a formal tender of the property.—Wester v. Casein Co. of America, N. Y., 100 N. E. 488.

102.——Symbolic Delivery.—The delivery of a bill of lading is symbolic delivery of the property, and its transfer by the person having possession has the same effect as a transfer of the property.—B. F. Swartz & Co. v. Woldert Grocery Co., Ky., 152 S. W. 934.

103. **Telegraphs and Telephones**—Free Delivery Limits.—That the addressee lived beyond the free delivery limits did not relieve a telegraph company from its duty to exercise ordinary diligence to deliver the telegrams, where it made no demand for extra charges for delivery.—Western Union Telegraph Co. v. Wilson, Tex., 152 S. W. 1169.

104.——Mental Suffering.—A wife, who had no affection for her father-in-law, could not recover for mental anguish resulting from her inability to attend the funeral of such father-in-law at the request of her husband, where her only reason for attending the funeral was out of consideration for her husband.—Western Union Telegraph Co. v. Crow, Ark., 152 S. W. 1015.

105. **Trade Marks and Trade Names**—Unfair Competition.—In a suit for unfair competition, it is not necessary to prove actual deception; but it is sufficient if the actual and probable result of the use of defendants' labels will be the deception of the ordinary purchaser making purchases under ordinary conditions.—Notaseme Hosiery Co. v. Straus, C. C. A., 201 Fed. 99.

106. **Trusts**—Fraudulent Conveyance.—Where a purchaser of land paying the price had the title put in the name of third persons to defraud judgment creditors and his wife, from whom he sought a divorce, there was no resulting trust in his favor.—Johnson v. Johnson, Ark., 152 S. W. 1017.

107.——Naked Power.—Where testator has created a naked power all of the trustees must qualify to convey, although a single trustee may convey, where the power is coupled with an interest.—Atzinger v. Berger, Ky., 152 S. W. 971.

108. **Vendor and Purchaser**—Equitable Mortgage.—A vendor's lien is not an equitable mortgage, but is merely treated in equity as a mortgage, and enforced as such.—Priddy & Chambers v. Smith, Ark., 152 S. W. 1028.

109.——Rescission.—A purchaser of land who sells it to a third party who assumes payment of the vendor's lien notes is not in a position to rescind.—Dashiell v. Christian, Tex., 152 S. W. 1112.

110. **Wills**—Contingent Estates.—Where several estates created by testator were of such character as to render it impossible during the life of a daughter to ascertain to whom the property falling to her in the division would ultimately go, the executors held pursuant to an executory trust at least until the death of the daughter, and the interest of her surviving children as remaindermen was also represented by such trustees.—Wadley v. Le Cato, Ga., 77 S. E. 47.

111.——Domicile.—It is a general principle both of the international and municipal law that wills of personalty are to be construed and effect given them by the law of testator's domicile.—In re New York Life Ins. & Trust Co., 139 N. Y. Supp. 695.

112.——Testamentary Capacity.—That a will provided that part of the estate should be divided between testator's two brothers was not evidence of want of testamentary capacity, though one of the brothers, as testator then knew, was dead.—In re Evenson's Will, Wis., 139 N. W. 766.

113. **Work and Labor**—Implied Promise.—While ordinarily the law implies a promise to pay from the rendition and acceptance of services, the presumption may be rebutted by the existence of relations between the parties, which raises a presumption to the contrary.—Gjurich v. Fieg, Cal., 129 Pac. 464.

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